DR MUHAMAD FADLY RAMLY A

v.

BRIG JEN (DR) DATO' HJ SAMIRAN & ORS

HIGH COURT MALAYA, IPOH B
LEE SWEE SENG JC
[CIVIL SUIT NO: 22-46-2009]
29 APRIL 2013

ARMED FORCES: *Armed Forces Council - Jurisdiction - Public* C
servant - Temporary secondment of plaintiff to serve at Armed Forces Hospital terminated when transfer order issued requiring plaintiff to report to government hospital - Whether plaintiff subjected to discipline at Armed Forces Act for offence of AWOL - Whether Armed Forces Council had disciplining authority over plaintiff - Whether plaintiff under jurisdicition D
of Public Service Commission

CONSTITUTIONAL LAW: *Public servants - Medical officer with Ministry of Health - Temporary secondment of plaintiff to serve at Armed Forces Hospital terminated when transfer order issued requiring plaintiff* E
to report to government hospital - Whether plaintiff could not report for work at government hospital until he was decommissioned from the force - Whether plaintiff could be subjected to open arrest and court-martial for desertion - Whether jurisdiction of Armed Forces over plaintiff ceased upon termination of secondment - Whether plaintiff's commissioning and F
court-martial ultra vires and invalid

TORT: *Damages - Claim for - Unlawful detention - Health Ministry terminated temporary secondment of plaintiff and recalled him to work in government hospital - Whether plaintiff who had been commissioned as naval officer could be subjected to open arrest and court-martial* G
for desertion - Whether jurisdiction of Armed Forces over plaintiff ceased upon termination of secondment - Whether plaintiff's commissioning and court-martial ultra vires and invalid

The plaintiff, who was a medical officer with the Ministry of H
Health ('MOH'), was temporarily seconded to the Ministry of Defence ('MINDEF') for two years at the expiry of which his secondment was extended for another two years. The plaintiff served at the Armed Forces Hospital at the Royal Malaysian Navy base in Lumut, Perak. As far as administration and discipline was I
concerned, the plaintiff was under the authority of the Public Service Commission and the secondment was governed by a

Service Circular of the Public Service Department ('PSD') which, *inter alia*, required MINDEF to release the plaintiff when required to do so by MOH. Whilst serving in MINDEF, the plaintiff was commissioned as a Captain. About seven months into his second two-year term of secondment, the MOH issued a transfer order requiring the plaintiff to report for duty at the Selayang Hospital which was then facing an acute shortage of experienced medical officers. The first defendant, the commanding officer who headed the armed Forces Hospital at the Lumut naval base, took the view that the plaintiff could not report for work to the Selayang Hospital until he was decommissioned from the force. The plaintiff complied with the transfer order and decided to serve at the Selayang Hospital whilst awaiting the paperwork for his decommissioning to be done. When he found that the salary payable to him by the Armed Forces had been withheld, the plaintiff returned to the Lumut naval base to sort out matters. Once he arrived at the base, the plaintiff was put under open arrest for absenting himself without leave ('AWOL'). His open arrest lasted for 141 days during which time he was denied all privileges and was unable to leave the base. To put an end to his predicament, the plaintiff pleaded guilty to the AWOL charge before a court-martial. His conviction, however, was not confirmed by the Chief of Navy under s. 122 of the Armed Forces Act 1972 ('AFA') as a review of his case showed that the plaintiff's commissioning in the armed forces was *ultra vires* the PSD's Service Circular and there was no jurisdiction to court-martial him. Despite the plaintiff's secondment to MINDEF being cut short by the transfer order and despite the Chief of Navy not confirming the conviction of the court-martial, the plaintiff was only decommissioned and released from the Armed Forces on the expiry of the full term of his extended secondment. Due to the delay, the plaintiff lost out on an opportunity to become a medical lecturer with the UiTM in Shah Alam which had offered him the post. The plaintiff brought the instant action for damages for negligence against the defendants for putting him under open arrest and for unlawfully court-martialing him. The Government of Malaysia, as employer of the first and second defendants, was cited for being vicariously liable for their acts or omissions. Apart from arrears of salary, the plaintiff claimed for general damages for wrongful detention, pain and suffering and loss of reputation as well as for aggravated and exemplary damages.

Held (allowing claim with costs):

(1) The plaintiff had proved on a balance of probabilities his claim for negligence against the defendants. The failure to comply with the letter and spirit of the PSD's Service Circular, and in particular para. 25 thereof, had resulted in the confusion and consternation caused to the plaintiff. Paragraph 25 expressly provided that in the event the seconding agency shortened the period of secondment of the officer concerned, the seconded agency would release the said officer. (para 38)

(2) In keeping with both the letter and spirit of the Service Circular, once the plaintiff had, pursuant to MOH's transfer order, reported for work at the Selayang Hospital, he could not be subject to the discipline of the Armed Forces Act for the offence of AWOL. As the defendants knew for a fact that the plaintiff had been ordered back to work in his original service with the MOH and with that his temporary secondment to MINDEF had come to an end, the Armed Forces Council no longer had any disciplining authority over the plaintiff where AWOL was concerned. Effective from the date of MOH's transfer order, the plaintiff had crossed over from being under the jurisdiction of the Malaysian Armed Forces to being under the jurisdiction of the Public Service Commission. (paras 16 & 45)

(3) The court awarded the plaintiff RM10,626.78 being arrears of salary; RM282,000 as general damages for wrongful detention; RM100,000 for pain and suffering and loss of reputation; RM50,000 for aggravated damages; and RM50,000 for exemplary damages. (para 84)

Case(s) referred to:

Abdul Salam Husin v. Majlis Angkatan Tentera & Anor [2011] 2 CLJ 1 FC ***(refd)***

Ashley v. Chief Constable of Sussex Police [2008] 2 WLR 975 ***(refd)***

Kerajaan Malaysia & Anor v. Yong Moi Sin [2010] 2 CLJ 99 HC ***(refd)***

Laksamana Realty Sdn Bhd v. Goh Eng Hwa [2005] 4 CLJ 871 CA ***(refd)***

Lim Guan Eng v. Utusan Melayu (M) Bhd [2012] 2 CLJ 619 HC ***(refd)***

Majlis Angkatan Tentera Malaysia & Anor v. Mejar Fadzil Arshad [2012] 4 CLJ 748 CA ***(refd)***

Nortel Networks (Asia) Ltd & Ors v. Sapura Holdings Sdn Bhd [2012] 8 CLJ 296 CA ***(refd)***

A *Pekan Nenas Industries Sdn Bhd v. Chang Ching Chuen & Ors [1998] 1 CLJ 793 FC* ***(refd)***
Roshairee Abd Wahad v. Mejar Mustafa Omar & 2 Others [1997] 1 CLJ Supp 39 HC ***(refd)***
State Government of Perak v. Muniandy [1985] 1 LNS 117 SC ***(refd)***

B **Legislation referred to:**
Armed Forces Act 1972, ss. 5C, 6(1), 9, 54(1)(a), 122, 125
Evidence Act 1950, s. 114(g)
Federal Constitution, arts. 5(1), 137(1), 144(1)

C *For the plaintiff - Norhasham Hassan; M/s Norhasham & Assocs*
For the defendants - Shamsul Bolhassan (Nurul Farhana Khalid with him); SFC

Reported by Ashok Kumar

D

JUDGMENT

Lee Swee Seng JC:

E **[1]** The plaintiff was seconded temporarily from the Ministry of Health ("MOH") to the Ministry of Defence ("MINDEF") as a medical officer. The secondment was subject to a service circular of the Public Service Department ("PSD") which requires the seconded Ministry to release the said staff when required to do so by the seconding Ministry. Whilst he was in the MINDEF he was apparently commissioned with the rank of Captain. His learned counsel contended that there is no evidence that the consent of the Public Service Department was obtained. When the MOH wanted him back and issued him with a transfer order to report to work at the Selayang Hospital, the plaintiff duly complied with the said order to the chagrin of the MINDEF. MINDEF wanted him to be decommissioned first before the transfer back could take effect. Caught in a bind, the plaintiff decided to serve with the MOH while awaiting the paperwork for his decommissioning to be followed through to its completion, which the plaintiff understood to be a mere formality.

[2] However his salary was withheld and so with no income for eight months, he had to go back to the Navy base in Lumut to sort out matters. Upon his arrival he was put under open arrest and remained so until he was court-martialed. He was found guilty

of Absent Without Leave ("AWOL"). As it turned out, that conviction was not confirmed by the Chief of Navy on ground that the decision was *ultra vires* the relevant service circular of the PSD with respect to the temporary secondment of an officer, here from the MOH to MINDEF.

[3] Be that as it may, the plaintiff felt that he had been unfairly dealt with through no fault of his own but rather because two different ministries that he had served before could not agree on the law and procedure governing his secondment and his being recalled back to his original service.

Parties

[4] The first defendant D1 was the Commanding Officer of the Armed Forces Hospital in the Royal Malaysian Navy base in Lumut and an agent and servant of the third defendant D3, the Government of Malaysia. The second defendant is First Admiral Gunaselan Salamuthu, an officer of the Royal Malaysian Navy and was carrying out the duties as the Convening Authority of the Naval Support Headquarters, in the Royal Malaysian Navy base in Lumut and an agent and servant of D3.

Problem

[5] As a medical officer serving with the MOH, the plaintiff was under the authority of the Public Service Commission ("PSC") where administration and discipline are concerned. This is provided for under art. 144(1) of the Federal Constitution of Malaysia. In 2004, the plaintiff, Dr Fadly was seconded temporarily for two years to the Malaysian Armed Forces. The approval of the PSC for his secondment was given on 23 November 2004.

[6] Whilst serving in the Lumut Armed Forces Hospital, Dr Fadly had the opportunity to serve in West Sahara under the auspices of the United Nations. His commission was extended until 2 November 2008 after its first expiry. Whilst still in Lumut Dr Fadly was given a posting order to return to serve in the Selayang Hospital commencing 1 June 2007 enroute to serving as a medical lecturer in UITM. Apparently D1 took the view that the plaintiff could not report to work with the Selayang Hospital under his decommission or the cancellation of his commission had been completed. Whilst serving in the Selayang Hospital and this with the knowledge of the defendants, the defendants contended that he was AWOL. As a result his salary was withheld. When

A he went back to Lumut Naval base to sort out the problem he was put under open arrest pending investigation by the D1 who was the Commanding Officer of the Armed Forces Hospital. The plaintiff contended that during the investigation D1 was negligent in failing to properly ascertain that the plaintiff was in reality a B temporary seconded officer and as such not subject the Armed Forces Act 1972 ("AFA"). It was further argued that D1 failed to accept the advice of Lt Kol Nur Sabrina bin Abdullah, PW2, who was at all material times the officer incharged of coordinating the secondment and commissioning of Dr Fadly in the Malaysian C Armed Forces who had duly informed him that the secondment would come to an end on 1 June 2007; the date of the posting back in the transfer order issued by the MOH. She had also confirmed that Dr Fadly was serving in the Selayang Hospital. She had also recommended that no disciplinary action be taken against D Dr Fadly. The plaintiff argued that D1 also failed to fully appreciate the fact of the plaintiff serving at the material time at the Selayang Hospital and that the MOH could not release him to go back to the Lumut Armed Forces Hospital pending the completion of his decommissioning as the Selayang Hospital was E facing an acute shortage of experienced medical officers.

[7] D1 proceeded with the disciplinary proceeding against Dr Fadly in that he was put under open arrest following a rigorous routine for 141 days and during the period he was still not paid F his salary in arrears for eight months already. His salary remained unpaid even after Dr Fadly reported back to work at the Armed Forces Hospital in Lumut on 13 December 2007. D1 failed to ensure that the salary of Dr Fadly was so paid and merely assumed that the Armed Forces Salary Unit would be attending G to it.

[8] On 30 April 2008 a court-martial was convened and Dr Fadly was charged for the offence of AWOL. The court-martial found him guilty but the said conviction was not confirmed by the Chief of Navy on the ground that the commissioning of Dr Fadly H was *ultra vires* the relevant service circular of the PSD.

[9] Dr Fadly was however not released eventhough the order was not confirmed and the temporary secondment had ceased on 1 June 2007. Dr Fadly was only decommissioned and released I

from the Malaysian Armed Forces on 2 November 2008, the expiry of the second period of temporary secondment to MINDEF had it not been shortened by MOH. By that time the offer from UITM to serve as a medical lecturer had lapsed and to his disappointed he had missed the opportunity to pursue his next calling.

Prayer

[10] Feeling the injustice done to him he decided to file this suit claiming damages for negligence on the part of the defendants in putting him under open arrest and in court-martialing him for AWOL which decision was not confirmed by the Chief of the Royal Malaysian Navy on ground that the proceeding was *ultra vires* the relevant service circular. The period claimed for damages for negligence was for the period from 13 December 2007 (date of reporting to the Armed Forces Hospital) until 30 April 2008 (date of court-martial) which was for the period of open arrest of 141 days (as claimed in the statement of claim).

[11] There was also another period from 30 April 2008 till 2 November 2008 which is the period after and before being decommissioned and released from the Malaysian Armed Forces. This period is for 182 days. However this period does not form the subject matter of the present claim.

Principle

Whether The Malaysian Armed Forces Had The Authority Over The Plaintiff Who Was On Temporary Secondment From The Ministry Of Health After The Effective Date Of The Transfer Order Back To The Ministry Of Health

[12] The plaintiff, Dr Fadly, an officer of the MOH was at all times under the Public Service Commission. Article 144(1) of the Federal Constitution sets out the scope of powers of the PSC. It reads as follows:

> 144. Functions of Service Commissions
>
> (1) Subject to the provisions of any existing law and to the provisions of this Constitution, it shall be the duty of a Commission to which this Part applies to appoint, confirm, emplace on the permanent or pensionable establishment, promote, transfer and **exercise disciplinary control over members of the service or services to which its jurisdiction extends.** (emphasis added)

[13] The public service department has issued guidelines with respect to temporary and permanent secondment to another agency in Pekeliling Perkhidmatan No. 13 of 2000 ("the previous circular"). This was superceded and replaced by Pekeliling Perkhidmatan No. 1 of 2007 ("the service circular") effective 4 January 2007. Paragraph 2.1.6 of the previous circular and para. 7(k) of the service circular provide that a temporary secondment does not sever the person seconded from his original service unless it is a case of a permanent transfer to the seconded agency, or that the officer resigns, or his service is terminated or that he is dismissed or that he retires. Paragraph 2.1.11 of the previous circular and para. 7(o) of the service circular state that the power of discipline is still under the original service. Translated by me into English it reads:

> The Disciplinary Body for the seconded officer shall be that of the original service. If an officer has committed a misconduct that would justify a disciplinary action to be taken, the seconded agency may terminate the secondment of the said officer. The supplying agency may request the seconded agency to give a report and furnish evidence or witnesses regarding the misconduct, if necessary.

[14] Paragraph 3.18 of the previous circular stipulate and para. 25 of the service circular further confirm and clarify that the officer seconded can be called back anytime to his original service by terminating or shortening the period of secondment by giving a 30-day notice but that under certain circumstances the notice period may be reduced by consent of the seconding agency, the seconded agency and the said officer. The service circular went on to specifically state what was silent in the previous circular in that in the event of a request by the seconding agency for early termination of secondment, the seconded agency shall release the said officer.

[15] Learned counsel for the plaintiff, Encik Norhasham Hasan, is right in contending that the PSC was not obliged to release Dr Fadly to the Malaysian Armed Forces if the latter was not prepared to follow the said circular. PW2, Lt Kol Nur Sabrina bt Abdullah, staff 1 officer for Administration, Health Service Division of the Malaysian Armed Forces who was responsible for coordinating the secondment of Dr Fadly testified under cross-examination that the most important pre-condition for the

secondment was that they were required to comply with the relevant public service department circular on secondment ie, the then previous circular and the present service circular.

[16] According to the plaintiff's counsel, it is clear from the said circular governing secondment that Dr Fadly was seconded temporarily (and not permanently) and was not subject to the disciplinary authority of the Malaysian Armed Forces. I would add a qualifier which is that since the plaintiff had subsequent to his secondment been commissioned, he was subject to the discipline of the Armed Forces for matters done during his tenure with the Armed Forces as a commissioned officer; otherwise there would be chaos in the proper ordering of affairs as is rightly expected in the Armed Forces. The Malaysian Armed Forces has disciplinary authority over its own members through the Armed Forces Council as provided in art. 137(1) do the Federal Constitution. It reads:

> 137. Armed Forces Council
>
> (1) There shall be an Armed Forces Council, which shall be responsible under the general authority of the Yang di-Pertuan Agong for **the command, discipline and administration of, and all other matters relating to, the armed forces,** other than matters relating to their operational use. (emphasis added)

[17] The learned Senior Federal Counsel ("SFC") Puan Nurul Farhana submitted that since the plaintiff had been commissioned, he is subject to the discipline under the Armed Forces Act and that continues until his decommissioning. With respect, in keeping with both the letter and spirit of the said circular, once he has pursuant to the transfer order of the MOH reported to work in this case at the Selayang Hospital, he cannot be subject to the discipline of the Armed Forces Act for the offence of AWOL.

[18] It goes without saying that a man cannot serve two masters. Either he would hate the one and love the other, or he will be devoted to the one and despise the other. Here it is not that he loved the Armed Forces less, for he had served a stint in the UN Peace Keeping Force in West Sahara but that he loved the MOH more and had applied for a transfer back to pursue his next calling as a medical lecturer in UITM and pending the documentation for that, to serve as required by the MOH at the Selayang Hospital in the Emergency Department. He wanted to be released to

pursue his next love which was in the academia in the field of lecturing and teaching in medicine with a specialization in emergency surgery.

[19] He must have found himself, though too late in the day, to be torn between two competing masters; each wanting the whole of him and both would not relent. "Torn between two lovers, feeling like a fool; loving both of you is breaking all the rules!", as are the words of the song popularised by Mary MacGregor.

[20] It is a most unenviable position to be in; not to report to the MOH for work would be insubordination for which he can be dismissed by the Public Service Commission and to report to work, as he was later to find out though too late in the day when he returned to the Lumut Armed Forces Hospital, would be to be court-martialed and dismissed!

[21] The learned SFC Puan Nurul Farhana kept stressing that she could not emphasise enough the status of the plaintiff as a commisssioned officer holding the rank of Captain and that until and unless he had been decommissioned he was not going to go anywhere save to serve at the Lumut Armed Forces Hospital or at the behest of the Armed Forces. A case of "Their's not to reason why, their's but to do and die," from Alfred Lord Tennyson: *The Charge of the Light Brigade*.

[22] There was some debate raised by learned counsel Encik Norhasham as to whether the plaintiff had been validly and properly commissioned. There is no need to go down that road. For one thing it was not raised in the plaintiff's pleading and in fact raised for the first time at the trial through his examination-in-chief of PW2 Lt Colonel Nur Sabrina. It was pleaded in para. 2 of the statement of claim as follows:

> After being temporarily seconded to MINDEF commencing 3 November 2004, the Plaintiff was commissioned as an officer of the Armed Forces holding the rank of Captain. Be that as it may, the Plaintiff was still subject to his original service and bound by the Service Circular No. 1 of 2007.

[23] PW2 had testified and this was confirmed by PW5 Encik Azrul Aduka bin Ahmad, a human resource officer from MOH, that the said commissioning was done without the consent of the PSC/MOH. At any rate no one produced in court the consent of the

PSC if indeed it had been obtained. The plaintiff on his part through his witnesses could of course not produce that which he maintained was not given.

[24] The plaintiff might not have fully appreciated the significance and seriousness of being commissioned. He said he was given to understand by PW2 that it was more for his emolument, allowances and other benefits. He was not even conscious that the process of commissioning had been concluded as he thought it would culminate in some solemn ceremony with probably some pomp and pageantry. In court he was shown a two-page form duly filled up by him at pp. 27-27A of bundle C (supplemental common bundle of documents) which has as its heading:

PENYAKSIAN

Menjadi seorang anggota dalam Angkatan Tentera Malaysia.

[25] At p. 1 of the form is the statutory declaration of the plaintiff where he had written his answers truthfully to the questions asked. It was dated 3 November 2004. Below that at p. 2 was stated under the heading "period of service" under b as "Short Term Commission for a period of two years."

[26] Below that was the oath of allegiance to the Yang Dipertuan Agong to be sworned. That was followed by the following:

AKUAN DARIPADA PEGAWAI YANG MENGESAHKAN

Saya akui bahawa penyaksian anggota yang tersebut di atas adalah betul dan sempurna dipenuhkan. Dengan yang demikian, Saya lulus dan sahkan kemasukan anggota ini.

[27] It was signed off by the Director of Record and Pension of the Malaysian Armed Forces as the confirmation officer.

[28] It is quite safe to conclude that for all intents and purposes the plaintiff had become a commissioned officer as was so pleaded in para. 2 of the statement of claim. The case in point as cited by the learned SFC is that of the Supreme Court in the *State Government of Perak v. Muniandy* [1985] 1 LNS 117; [1986] 1 MLJ 490. The facts as gleaned from the headnotes stated that the respondent, who was an employee of the appellant, hitched a ride in a lorry belonging to the appellant and driven by an

A employee of the appellant. The driver was on duty at the time and was driving the lorry in the course of his employment. The respondent was going home to hand over his pay to his wife. On the way the lorry met with an accident and the respondent was injured. The driver of the lorry admitted liability and also admitted
B that he did not object to the respondent taking a lift on the lorry and he did not tell the respondent that he could not ride on the lorry. The learned trial judge held that the appellant was vicariously liable. The appellant appealed. The approach taken by His Lordship Hashim Yeop A Sani SCJ (as His Lordship then
C was) bears repetition at p. 492:

> Purporting to rely on Twine and Conway the appellant in their statement of defence averred that the respondent was on the said JKR lorry at the time of the accident "without the express or implied authority of the appellant" and that the respondent boarded
D the lorry to deliver money to his wife which was a personal matter and not connected with his employment. It would appear from the record of the proceedings before the trial Judge that the appellant attempted to introduce evidence relating to a certain administrative circular dated December 29, 1969 which prohibited
E all employees from boarding government vehicles without permission. DW2, a JKR supervisor, however, admitted in his evidence that he himself never saw this administrative circular at any time before the hearing. The learned Judge noted that the statement of defence never pleaded that:
>
F (1) There was such a prohibition affecting employees of the appellant; and
>
> (2) The driver had allowed the respondent to travel in the lorry in breach of the prohibition.
>
G Parties are bound by their pleadings and we do not think that the appellant should on the admitted facts of this case be allowed to avoid vicarious liability merely on the bare fact that there was such an administrative circular relating to the prohibition.

H **[29]** The attempt to raise what was contended to be an invalid commissioning without the consent of the PSC when such an important matter was not properly and pointedly pleaded must be eschewed and thus excluded from being raised now in evidence.

I

[30] This court takes into consideration that the act of commissioning is ultimately done at the behest of the Yang Di-Pertuan Agong on the recommendation of the Armed Forces Council as provided for under s. 6(1) of the AFA in the language of the exercise of absolute prerogative power and discretion. It reads:

> 6.(1) The Yang Di-Pertuan Agong may on the recommendation of the Armed Forces Council grant to any person a commission in the Army, Navy or the Air Force, as the case may be:
>
> Provided that only persons being Malays shall be commissioned in the Royal Malay Regiment.

[31] Likewise s. 9 speaks of the cancellation of commissions in the language of absolute prerogative power as follows:

> 9. The Yang Di-Pertuan Agong may on the recommendation of the Armed Forces Council at any time without assigning any reason therefore cancel any commission granted under the provision of this Part.

[32] The SFC cited two authorities to support the proposition that the validity of the commissioning of the plaintiff cannot be challenged in this court. The two cases are that of the Federal Court case of *Abdul Salam Husin v. Majlis Angkatan Tentera & Anor* [2011] 2 CLJ 1 and the Court of Appeal case of *Majlis Angkatan Tentera Malaysia & Anor v. Mejar Fadzil Arshad* [2012] 4 CLJ 748. Though the two cases were in the context of the validity of the cancellation of the commission, I would hold that the same principle applies to the commissioning of the officer. The rationale is clearly stated by His Lordship James Foong FCJ in *Abdul Salam Husin's* case *(supra)* at p. 12 as follows:

> [17] ... the most prevalent reason seem to stem from the fact that the commission of a member of the armed forces is at the pleasure of the Crown: *durante bene placito* (which basically means: during our good pleasure). When such commission is at the pleasure of the Crown then conversely it can be withdrawn or cancelled at any time at the pleasure of the Crown. The Crown is not obliged to give any reason for doing so.

[33] The learned SFC called in aid s. 114(g) of the Evidence Act 1950 which provides as follows:

> The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business, in relation to the facts of the particular case.
>
> Illustrations
>
> The court may presume:
>
> …
>
> (f) that the common course of business has been followed in particular cases.

[34] The Federal Court in *Pekan Nenas Industries Sdn Bhd v. Chang Ching Chuen & Ors* [1998] 1 CLJ 793; [1998] 1 MLJ 465 at p. 520, speaking through His Lordship Edgar Joseph Jr FCJ observed:

> … So far as material, illustration (f) provides that: 'The court may presume that the common course of business has been followed in particular cases'.
>
> > Woodroffe and Amir Ali on the Law of Evidence (15th Ed, 1991) in commenting on the scope and applicability of illustration (f) of s. 114 of the Indian Evidence Act, which is in *pari materia* with ours, say this (at p. 849):
> >
> > Several presumptions are made from the regular course of business in public offices …
> >
> > … Similar presumptions are drawn from the usual course of men's private offices and business …
>
> Similarly, the learned authors say this (at p. 863):
>
> > Actually under this section, **there is a presumption** not only **that official acts have regularly been performed,** but also that ordinary business acts have normally been carried out. (emphasis added)

[35] The defendants' witnesses testified that they were sure the consent of PSC had been obtained though they were not in a position to produce the written consent of the PSC. DW3 Captain Azhari bin Abdul Aziz, the Legal Director of the Royal Malaysian Navy, confirmed in re-examination that by letter dated

23 November 2004 in pages pp. 1-2 of bundle B common bundle of documents, the PSC had informed the plaintiff through the Chief Secretary of the MOH that the approval to release the plaintiff for secondment to MINDEF as a medical officer Grade ZU 41 commencing from the date of reporting for duty. It was signed off on behalf of the secretary to the PSC by one Mohammad-Abiddin bin Abd Rahman. The said letter was also carbon-copied to PW2 Lt Kol Noor Sabrina. It was explained by DW3 that the designation ZU 41 denotes the grade of a medical officer who is a member of the Armed Forces, or otherwise if it is a case of a non-commissioned officer it would be designated as UD 41. He also confirmed that there were serving officers seconded from the MOH who were not commissioned and their grade is that of UD 41. The learned SFC submitted that it is safe for this court to make the necessary inference that consent of the PSC had been given. She further submitted that the oral evidence of PW2 and PW5 must be critically tested against the whole of the other evidence and circumstances of the case, citing the dicta of the Court of Appeal in *Nortel Networks (Asia) Ltd & Ors v. Sapura Holdings Sdn Bhd* [2012] 8 CLJ 296; [2012] 6 MLJ 491 at p. 498 as follows:

> [12] Whilst we had no issue with the finding of the learned judicial commissioner regarding the credibility of PW1, we were also of the view that, in assessing his evidence, the learned judicial commissioner ought to heed what Chang Min Tat FJ said in *Tindok Besar Estate Sdn Bhd v. Tinjar Co* [1979] 2 MLJ 229; [1979] 1 LNS 119 as follows:
>
> > Nevertheless the learned trial judge expressed himself to be completely satisfied with the veracity of the respondent's witnesses and their evidence. He purported to come to certain findings of fact on the oral evidence but did not notice or consider that the respondent's oral evidence openly clashed with its contemporaneous documentary evidence. For myself, I would with respect feel somewhat safer to refer to and rely on the acts and deeds of a witness which are contemporaneous with the event and to draw the reasonable inferences from them than to believe his subsequent recollection or version of it, particularly if he is a witness, with a purpose of his own to serve and if it did not account for the statements in his documents and writings. *Judicial reception of evidence requires that the oral evidence be critically tested against the whole of the other evidence and the circumstances of the case.* Plausibility should never be mistaken for veracity. (emphasis added)

[36] The MOH in its letter of 27 December 2005 to the Chief Secretary of MINDEF in exh. D2 still made reference in its caption to the grade of the plaintiff as that of UD 41 in extending the secondment of the plaintiff to MINDEF for another two years from 2 November 2006 to 1 November 2008. Perhaps it is more a case of the PSC not fully appreciating the significance of the designation Z as denoting a reference to a member of the Armed Forces. Be that as it may, it is more likely than not that on a balance of probabilities, the PSC would have consented expressly if not impliedly to the commissioning of the plaintiff.

[37] As has been observed before the issue is not a case of whether the plaintiff was a commissioned officer but more pointedly and precisely whether he is still subject to the disciplining authority of the Armed Forces Council for the offence of AWOL when the seconding agency here, the MOH had issued a transfer order, effective 1 June 2007, requiring the plaintiff to report for duty at the Selayang Hospital. True that the papers and process of cancellation of his commission had been put into operation but not concluded yet. In keeping with both the letter and spirit of the service circular, the transfer order must be given effect to, otherwise there would be much confusion and chaos, not to mention dissatifaction and discord, as happened here, over when a temporary secondment as in the plaintiff's case may be terminated bearing in mind the needs of the seconding agency and the terms on which the plaintiff was seconded to MINDEF. Both the seconding and seconded agency are deemed to know and indeed are presumed to be willing to abide by the service circular.

[38] The failure to comply with the letter and spirit of the service circular and in particular para. 25 thereof had resulted in the confusion and consternation caused to the plaintiff. It provided that in the event of the shortening of the period of secondment of the officer concerned by the seconding agency, the seconded agency shall release the said officer.

[39] There was a request from the Armed Forces Health Service Department made by letter dated 20 July 2007 to MOH to postpone the shortening of the temporary secondment. There were some negotiations to and from between the two agencies with respect to a possible extension of the date of the reporting back of the plaintiff to the MOH and that was after the plaintiff had reported back for duty. MOH initially agreed to a postponement to 31 December 2007 for the plaintiff to report to the Selayang

Hospital. However it was on condition that a replacement could be found for the plaintiff. The plaintiff could not leave the Selayang Hospital to return to the Armed Forces Hospital in Lumut as the Director of the Selayang Hospital did not allow him to on account of the fact of a shortage of qualified doctors in the said hospital. Suffice to say that it culminated in a rather stern letter dated 26 November 2007 at p. 72 of bundle B in the letter from the Human Resource Department of MOH signed off by PW5 Encik Azrul Aduka bin Ahmad addressed to the Chief Secretary of MINDEF for the Department of Health Services as follows being translated into English from Bahasa Malaysia:

> 2. Please be informed that your request for postponement of the termination of the secondment of Dr. Muhammad Fadly Bin Ramly @ Hashim, Medical Officer Grade UD 41 cannot be entertained. As you are already aware, the said officer has reported back to work in this Ministry. You are required to forward us the identification card, latest salary slip, service book and relevant documents of the said officer to the Selayang Hospital as soon as possible.
>
> 3. This decision is final and consistent with Paragraph 25 of the Service Circular No. 1 of 2007 and the discussion with the Public Service Department of Malaysia.

[40] The said letter was carbon-copied to the State Director of Health of Selangor, the Director of the Selayang Hospital and the plaintiff.

[41] Resting on the comfort and protection of the above letter, the plaintiff continued working in the Selayang Hospital. However until the end of November 2007 Dr Fadly had not received his salary. He decided with the consent of the Director of the Selayang Hospital to go to Armed Forces Hospital in Lumut to check out what was wrong. Upon arrival there on 11 December 2007 he was detained. The rest as they say is history.

[42] The plaintiff was placed under open arrest until his court-martial on 30 April 2008. He pleaded guilty to the offence of AWOL for he could not stand the stress, shame and suffering any longer and wanted the nightmare to end as soon as possible. He was dismissed by the tribunal but the said verdict has to be confirmed by the Admiral before it could be enforced. The said verdict was not so confirmed on 21 July 2008. On 2 November 2008 he was released from the Armed Forces, the date of the expiry of his extended secondment of two years.

[43] With the transfer order effective from 1 June 2007, as at that date the temporary secondment of the plaintiff to MINDEF had come to an end. The evidence of D1 as DW2 herein was that the plaintiff had obtained his permission before reporting to work at the Selayang Hospital. This is consistent with D1's action in instructing the Armed Forces Hospital which was under his command, to forward the application for the cancellation of the commission of Dr Fadly to MINDEF on 29 May 2007 (pp. 11A -11B of bundle B).

[44] Indeed on the 12 December 2007 upon being notified by Dr Fadly of his detention at the Armed Forces Hospital in Lumut, the Director of the Selayang Hospital had issued a letter enclosing photocopies of the punch card of the Dr Fadly showing that he had reported to the Selayang Hospital from 1 June 2007 till 10 December 2007 before he left for Lumut on 11 December 2007 to check on the status of his salary that he had not received. See p. 74 and pp. 14-49 of bundle B.

[45] Based on the overall circumstance of the case where the defendants knew for a fact that the plaintiff had been ordered back to work in his original service with the MOH and with that the temporary secondment to MINDEF had come to an end, MINDEF no longer had any disciplining authority over him where AWOL was concerned. He could only serve one Ministry at a time for he could not be in more than one place at a time. Whilst he was serving upon the effective transfer order date of 1 June 2007 in the Selayang Hospital, he cannot be said to be subject still to the jurisdiction of the Armed Forces Council for what is said to be an offence of AWOL. Effective from the transfer order date of 1 June 2007, he had crossed over from being under the jurisdiction of the Malaysian Armed Forces to under the jurisdiction of the PSC.

Whether The Defendants Were Negligent In Subjecting The Plaintiff To Open Arrest And For AWOL When The Plaintiff's Reporting To Work At Selayang Hospital Was Pursuant To A Transfer Order From His Original Service Under The MOH

[46] The plaintiff Dr Fadly had enumerated and elaborated the particulars of negligence in para. 23 of his statement of claim and in his evidence.

[47] The defendants' action in court-martialling the plaintiff had arisen from the misconceived notion that for so long as the commission of the plaintiff had not been cancelled, he is subject to the disciplining authority of the Armed Forces under the AFA irrespective of the fact that being on temporary secondment he had his secondment shortened and terminated and had received a transfer order to report back to work at the Selayang Hospital. If only the defendants have considered the terms and conditions of the temporary secondment as set out in the Previous Circular No. 13 of 2000 and the Service Circular No. 1 of 2007 of the PSD. It is a set of guidelines on the appointment by way of secondment, temporary transfer and permanent transfer. Paragraph 25 of the service circular expressly provided for a situation in which the secondment of the officer concerned is shortened by the seconding agency. It requires that seconded agency to release the said officer. There is no two ways about it. Otherwise there would be chaos and confusion between one government agency and another. As is set out in para. 2 of the background to the service circular the whole purpose of the secondment and temporary transfer is to allow the seconded agency to receive the benefit of the service of officers who are experienced, highly skilled and being able to meet the needs of the seconded agency. It is a short-term measure to support a new agency in settling and stabilising its operations. That which is designed to support and stabilise should not be allowed to degenerate into squabbling over the subject officer with respect to his proper place of service in a single Federal Government service in a 1Malaysia!

[48] If only proper legal advice had been sought with respect to the position with respect to a temporary secondment of an officer who had been commissioned, this predicament and the punishment suffered by the plaintiff could have been avoided. The proper procedure and process must be put in place and complied with by both the seconding and seconded agency to avoid the embarrassing impasse.

[49] The legal advice of the learned judge advocate of MINDEF Tuan Anas Ahmad Zakie dated 10 July 2008 addressed to the Admiral of the Royal Malaysian Navy with respect to the status

of a medical officer seconded from the MOH to MINDEF is at p. 98 of bundle B. Paragraph 2 and 3 of the said advice reads as follows when translated into English:

> I wish to inform you that based on the facts as stated in your letter stated above, I am of the view that the period of the secondment of the said medical officer of the MOH, Captain (Dr) Mohammad Fadly bin Ramly @ Hashim to the Armed Forces does not break his bond with his original service in the MOH. This matter is clearly stated in paragraph 4 of the Service Circular No. 1 of 2007. The said officer is still subject to the Disciplining Authority of his original service consistent with what is stated in paragraph "7(c)" of the same circular.
>
> 3. Therefore, I am of the view that the trial of the said officer before the Court-Martial is null and void.

[50] Much headache and heartache would have been spared if the advice had been sought earlier as to the appropriateness of court-martialing the plaintiff when the defendants were aware that the transfer order of the MOH had come into effect from 1 June 2007 and the plaintiff had reported back to work in the Emergency Department of the Selayang Hospital that was being confronted with the challenge of a shortage of doctors.

[51] A meeting was called for and chaired by the Deputy Director of the Service Division of the PSD on 17 July 2008 at the PSD in Putrajaya and attended amongst others by PW2, DW3 Captain Azhari bin Abdul Aziz of the Royal Malaysian Navy who was also its Legal Director) and Encik Nik Azhan Hakim bin Nik Mahmood, the Legal Adviser to the PSD. The caption of the minutes reads: Meeting in relation to the status of service of a medical officer grade UD 41 from the MOH who was temporarily transferred to MINDEF. It endorsed the opinion of the learned judge advocate and reaffirmed that the decision of the is null and void.

[52] There is a need for the finding and sentence of a court-martial to be confirmed by a confirming officer before it can take effect. This is provided for under s. 122 of the AFA which reads:

> **Confirmation of proceedings of courts-martial**
>
> 122. (1) Where a finds an accused guilty on any charge, the record of the proceedings of the shall be transmitted to a confirming officer for confirmation of the finding and sentence of the on that charge.

(2) A finding of guilty or sentence of a shall not betreated as a finding or sentence of the until confirmed:

Provided that this subsection shall not affect the keeping of the accused in custody pending confirmation or the operation of the two next following sections or the provisions of this Part as to confirmation or approval.

[53] The powers of the confirming officer are set out in s. 125 of the AFA as follows:

125. Powers of confirming officers

(1) Subject to the provisions of the last foregoing section and to the following provisions of this section, a confirming officer shall deal with the finding or sentence of a either:

(a) by withholding confirmation, if of opinion that the finding of the is under all the circumstances of the case unsafe or unsatisfactory or involves a wrong decision on a question of law or that there was material irregularity in the course of the trial;

(b) by confirming the finding or sentence; or

(c) by referring the finding or sentence, or both, for confirmation to a higher confirming officer:

Provided that the confirming officer may, notwithstanding that he is of opinion that he would apart from this proviso withhold confirmation of the finding, confirm the finding if he considers that no miscarriage of justice has actually occurred.

(2) *In lieu* of withholding confirmation of a finding of a court-martial, a confirming officer may, if:

(a) some other finding of guilty could have been validly made by on the charge before it; and

(b) he is of opinion that the must have been satisfied of the facts necessary to justify that other finding,

substitute that other finding, and if he does so he should consider in what manner, if at all, the powers conferred by subsection (4) should be exercised, or a confirming officer may, if he is of opinion that the case is not one where there should have been a finding of not guilty but that there

A should have been a finding that the accused was unfit to stand his trial, substitute a finding that the accused was unfit to stand his trial.

(3) Where it appears to a confirming officer that a sentence of is invalid, he may *in lieu* of withholding confirmation of the B sentence substitute therefor a sentence of any punishment or punishments which could have been awarded by the court-martial, not being greater than the punishment or greatest of the punishments awarded by the court-martial, and not in his opinion more severe than that punishment or those C punishments.

(4) In confirming the sentence of a court-martial, a confirming officer may:

(a) remit in whole or in part any punishment awarded by the D court-martial; or

(b) commute any such punishment for one or more punishment or punishments provided by this Act, being less than the punishment commuted.

E (5) In confirming any sentence, a confirming officer may postpone the carrying out of the sentence for such time as seems expedient, and a confirming officer may extend or terminate any postponement ordered under this subsection.

(6) A finding or sentence substituted by the confirming officer, F or any sentence having effect after the confirming officer has remitted or commuted the punishment awarded thereunder, shall be treated for all purposes as a finding or sentence of the duly confirmed.

(7) The confirmation of a finding or sentence shall not be G deemed to be completed until the finding or sentence has been promulgated; and in the event of any such substitution, remission or commutation as aforesaid the finding or sentence shall be promulgated as it has effect after the substitution, remission or commutation.

H (8) Where the confirming officer determines to withhold confirmation, the determination shall be promulgated and shall have effect from the promulgation thereof.

[54] Following the deliberation at the said meeting at the PSD I office, there was a letter from DW1 the Chief of Navy Admiral Tan Sri Abdul Aziz bin Hj Jaafar dated 21 July 2008 withholding

the confirmation of the decision of dismissal from the Armed Forces handed down from the court-martial. See pp. 105-106 of bundle B. The reason cited in para. 2 of the said letter was that a further review disclosed that the commissioning of the said officer in the Armed Forces was *ultra vires* the Service Circular No. 1 of 2007. It went on to state in para. 4 of the said letter that the court-martial had no jurisdiction to try the said officer and the trial is null and void *ab initio*.

[55] The last paragraph in para. 7 is instructive and imbued with a cautious concern that such a *faux pas* does not ever happen again. In its original language it reads:

> 7. Saya menjemput Yang Berbahagia Panglima Dan Pegawai Staf Sidang Markas Bantuan TLDM agar lebih berhati-hati dan teliti dalam semua aspek sebelum menyidangkan Mahkamah Tentera. Seharusnya, status pinjaman sementara pegawai tersebut seperti yang tertera para Kertas Penyiasatan perlu diteliti terlebih dahulu sebelum membuat keputusan menyidangkan Mahkamah Tentera. Ambil iktibar dan pastikan kejadian yang sama tidak berulang.

[56] The letter, written in the refined language of respect and restrain, says it all. It enjoins the persons responsible to be circumspectly cautious and careful in combing through investigation papers before constituting a court-martial.

[57] Taking the evidence as a whole the plaintiff has proved on a balance of probabilities the claim for negligence against the defendants.

Whether The Plaintiff Is Entitled To Special Damages And General Damages In The Circumstances Of The Case

[58] The salaries of the plaintiff that are in arrears because they have been wrongfully withheld must be paid forthwith. Both counsel confirmed that the salaries still not paid amounted to RM10,626.78 and so I made an order that D3 shall pay forthwith that sum as special damages to the plaintiff. Apparently some four months of his salaries equivalent to the period of AWOL were still withheld because the defendants were waiting if any disciplinary proceeding would be taken against him by the MOH. That would be double jeopardy! Here is not a case of a medical officer with a discipline problem. The incontrovertible evidence was that he was serving at all material times in the Selayang Hospital and even

while he was under open arrest in a room in the Armed Forces Hospital in Lumut, he had to work to maintain his sanity and to occupy his time fruitfully while awaiting the court-martial hearing. He saw patients as if he was working there normally but before long, the word had gone round that he was there under open arrest for AWOL.

[59] In fact there was no good reason to withhold his salary after the Chief of Navy had withheld confirmation of the findings and sentence of the court-martial. The fact that the arrears had not been paid when the court-martial sentence had not been confirmed on 21 July 2008 further aggravated the situation for the plaintiff. Such a thing should not have happened at all.

[60] The fact that he had been detained under open arrest is a serious intrusion into his liberty. An arrest no matter how open is still an arrest. He is not free to go where he would like to go. The worse was he did not know when his hearing would be pending investigation and the charge against him for AWOL under s. 54(1)(a) of the AFA was only framed against him on 16 April 2008 (p. 26 of bundle B) and the hearing fixed on 30 April 2008. The offence as described in the said section is that of desertion. In fact he had to tell the investigation officer that he had decided to plead guilty so as to terminate the harrowing and hapless situation he found himself to be in as he awaited; know not when the court-martial hearing would be. It was his indication that he would plead guilty that he was able to get an early date of hearing on 30 April 2008.

[61] The conditions of his open arrest are in the "routine of open arrest" given to him as found at p. 238 of bundle B. It was from 13 December 2007 until the conclusion of the investigation. He was to report at 2,000 hours every day. He was prohibited from watching movies, leaving the base and consuming alcoholic drinks. The recreational centre in the base was also out of bounds to him. He was not to drive for the purpose of reporting every day.

[62] He was given a spare room in the ward to sleep in. As for food he ate what was left behind of the patients' food.

[63] Considering his pay of RM3,087.98 per month and his standing as a medical doctor and the restrictions place on him and the loss of his liberty I assessed general damages at RM2,000 per day x 141 days amounting to RM282,000.

[64] As for pain and suffering and loss of reputation, I took into consideration the fact that he is a doctor and also the anxiety caused to him in the wrongful withholding of his salaries such that he could not service his loan from Bank Rakyat. He received a letter of demand from the bank and its solicitors.

[65] The signal message sent out regarding his open arrest was not classified as "secret" or "restricted" such that his open arrest became an open secret. See pp. 22-32 of bundle B. He was viewed with suspicion by the patients he visited in his daily routine as if he had a discipline problem and was being insubordinate. The shame and ignominy was too much to bear and he decided to end it all by pleading guilty and getting an early trial so that the agony might end.

[66] If there is any doubt as to whether the plaintiff can claim for this head of damages under loss of reputation in the context of false imprisonment or wrongful arrest, one may refer to the case of *Kerajaan Malaysia & Anor v. Yong Moi Sin* [2010] 2 CLJ 99 where at p. 104-105, His Lordship Vernon Ong observed:

> [8] The court agrees with the submission of learned counsel for the plaintiff that the final order of the Court of Appeal had directed the SCJ to assess damages for false imprisonment which includes loss of reputation ...
>
> Injury to feelings is that indignity, mental suffering, disgrace or humiliation with any attendant loss of social status. It is another form of loss of reputation (McGregor on *Damages* 16th edn, at para 1850 & 1851; *Rikhabchand*, *supra*). Even where there has been no physical injury, substantial damages may be awarded for indignity, discomfort or inconvenience. Where liberty has been interfered with damages are given to vindicate the plaintiff's rights even though no pecuniary damages has been suffered (Clerk and Lindsell on *Torts* 17th edn, at 12-80). In *Sailajanand*, *supra* the plaintiff sued on false imprisonment brought about by a magistrate. The court is awarding damages of Rs1,000 made reference to McGregors on *Damages*. In *Rikhachand*, *supra* an award of Rs1,600 for loss of reputation was made. Accordingly the award of RM150,000 is set aside and substituted with an award of RM50,000.

[67] Taking all that into consideration I assessed damages for pain, suffering and shame and loss of reputation at RM100,000.

Whether The Plaintiff Is Entitled To Aggravated Damages In The Circumstances Of The Case

[68] In *Lim Guan Eng v. Utusan Melayu (M) Bhd* [2012] 2 CLJ 619 it was opined as follows:

> 61. For **aggravated damages**, to be made the court has to take into account the conduct of the defendant, the conduct itself of the case and the defendant's state of mind. The want of an apology at early stages of the proceedings would not by itself entitle the plaintiff to an award of aggravated damages but once the weakness of the defendant's case becomes obvious, it would be natural to expect the defendant to place an apology on record. *Aggravated damages is given or ordered to show the court's reluctance to approve of or condone willful, outrageous conduct of the defendant which should not have been vented on the plaintiff.* (emphasis added)

[69] In the House of Lords case of *Ashley v. Chief Constable of Sussex Police* [2008] 2 WLR 975 at p. 1006 Lord Neuberger of Abbotsbury observed:

> *Aggravated damages are awarded for feelings of distress or outrage as a result of the particularly egregious way or circumstances in which the tort was committed, or in which its aftermath was subsequently handled by the defendant.* If that is so, I cannot see why such damages should not logically be recoverable in some categories of **negligence claims** ... (emphasis added)

[70] Here is a case where the problem could have been nipped in the bud by the responsible persons in both the seconding and the seconded agencies representing two different Ministries of the same Federal Government sitting down together to settle for what should be the standard operating procedure for an officer caught in such a bind; being pulled at one side by the MOH and the other side by MINDEF. Both agencies could have consulted their respective legal advisers. Here the parties were content to pit and prove their point against each other at the expense of the poor plaintiff who only wanted to serve the people in his calling as a doctor.

[71] The personal service file of the plaintiff was available for inspection of the defendants. There was no necessity of keeping him under open arrest for that length of time of some 141 days. A cursory look into the file would show that Dr Fadly was on temporary secondment to MINDEF from the MOH. The Service

Circular No. 1 of 2007 on the terms of such a temporary secondment must be complied with by the seconded agency, here it is MINDEF. There was no evidence led to show that the court-martial hearing could not have been fixed earlier. At any event the Navy Chief in DW1 had stated the whole proceeding of the court-martial to be null and void *ab initio*. Even after the withholding of the confirmation of the decision of dismissal from the Armed Forces on 21 July 2008, the plaintiff was not released from the Armed Forces until 2 November 2008 when his temporary secondment expired. That has to be viewed against the backdrop of a refusal to comply with both the letter and spirit of the service circular by MINDEF.

[72] I cannot see any reason why an officer cannot report to serve in his original service upon being called back to serve there whilst awaiting his paperwork to be processed for his decommissioning. The AFA even allows a member of the Armed Forces to be seconded by the Armed Forces Council to another agency under s. 5C and it may be to the service of a department of the Federal Government, a state, a local authority, a statutory authority or an organisation in or outside Malaysia. In as much as there is nothing intrinsically wrong in a fully-commissioned member of the Armed Forces serving as a medical officer, there is also nothing wrong in a temporarily seconded member of the Armed Forces to serve in his original service while awaiting the cancellation of his commissioning.

[73] In *Roshairee Abd Wahad v. Mejar Mustafa Omar & 2 Others* [1997] 1 CLJ Supp 39 at p. 49, His Lordship James Foong J (as he then was) observed as follows:

> Encik Karpal Singh in his submission highlights that within the category of compensatory damages, aggravated damages can also be awarded. This category of damages is described as: Compensation for the injured feelings of the plaintiff where the sense of injury resulting from wrongful physical act is justifiably heightened by the manner in which or motive for which the defendant did it - per Lord Diplock in *Broome v. Cassell & Co* [1972] AC 1027 @ 1124. It is to compensate the plaintiff for injuries affecting his feelings arising out of the tortious acts of the defendants. In assessing this, all circumstances of the case must be taken into account, including the character of the plaintiff -see Edmund Davis LJ in *Ansell v. Thomas* [1974] Crim. LR 31.

> In the opinion of this Court, the plaintiff may at the material time be weaker, less experience and lower in rank to the lst and 2nd defendants, but he was entitled, as all young officers do to self respect and dignity. **By the acts of the lst and 2nd defendants he has suffered humiliation, loss of pride and self esteem.** Instead of being encouraged, advised and protected by these two seniors, the plaintiff was insulted and assaulted by them. To compensate the plaintiff for the injury to his feelings, this Court awards a sum of RM50,000 as aggravated damages. (emphasis added)

[74] In the above case the plaintiff officer duly commissioned to the Royal Malay Regiment fresh after graduating from the Royal Military College was being ragged and assaulted by the defendants during orientation. Whilst relatively younger compared to Dr Fadly who was already 30 years old then, the incident was a once -off event whereas the present case involved the shame and ignominy stretching over 141 days with the plaintiff not knowing when the harrowing experience would end initially as no date was fixed for the court-martial hearing. The defendants also knew of the fact that he had been given an offer to be a trainee lecturer in UITM Shah Alam and indeed by the time he was released from the Armed Forces on 2 November 2008 the offer had already lapsed. See p. 10 of bundle B. In his letter for the attention of PW2 Lt Kol Noor Sabrina he had stated that UITM had offered him a place to further his studies to a Masters level. The letter of offer from UITM was also attached. The defendants knew or ought to have known that a delay in releasing him back to the MOH might cause him to miss the opportunity to pursue his next calling of teaching medicine in the academia.

[75] This court also took into consideration the plaintiff's exemplary conduct. His superior Brig Jen (Dr) Ya'akob bin Koming who was his commanding officer, in supporting his application for a shortening of his secondment to the Armed Forces, had this to say of him in his letter to the Ketua Pengarah Perkhidmatan Kesihatan of the Armed Forces of Malaysia at paragraph of the said letter of 5 January 2007:

> Throughout his service with the force since 3 Nov 2004, he has been stationed at various places and currently he is at the Orthopaedic Department ... He is a medical officer committed to his work and his responsibilities entrusted to him. For his undivided commitment to his tasks, he was chosen for the United Nations Mission in Minurso, West Sahara from 6 May to November 2006.

[76] His salary of about RM3,000 per month is hardly able to make ends meet and considering that the same had been delayed for eight months, constraining him to return to the Armed Forces base in Lumut to sort it out, would be indeed aggravating considering the high costs of living in Kuala Lumpur. The further withholding of his salaries of some four months arrears during his AWOL awaiting if the MOH would take any disciplinary action against him and which remained unpaid until even the date of the decision of this case is a reflection of the cavalier attitude of those entrusted to manage his salary payments in MINDEF.

[77] In the circumstance of the aggravating factors referred to above the court assessed aggravated damages at RM50,000.

Whether The Plaintiff To Exemplary Damages In The Circumstances Of The Case

[78] The basis for awarding 'exemplary damages' has been captured in *Laksamana Realty Sdn Bhd v. Goh Eng Hwa* [2005] 4 CLJ 871 in the words of Gopal Sri Ram JCA (as he then was):

> I now I turn to consider the award of exemplary damages. The basis for making an award of exemplary damages was set out by Lord Devlin in *Rookes v. Barnard* [1964] AC 1129, where after a discussion of some of the authorities on the subject he proceeded as follows:
>
> > These authorities convince me of two things. First, that your lordships could not without a complete disregard of precedent, and indeed of statute, now arrive at a determination that refused altogether to recognise the exemplary principle. Secondly, that there are certain categories of cases in which an award of exemplary damages can serve a useful purpose in vindicating the strength of the law, and thus affording a practical justification for admitting into the civil law a principle which ought logically to belong to the criminal. I propose to state what these two categories are; and I propose also to state three general considerations which, in my opinion, should always be borne in mind when awards of exemplary damages are being made. I am well aware that what I am about to say will, if accepted, impose limits not hitherto expressed on such awards and that there is powerful, though not compelling, authority for allowing them a wider range. I shall not therefore conclude what I have to say on

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> the general principles of law without returning to the authorities and making it clear to what extent I have rejected the guidance which they may be said to afford.

> The first category is oppressive, **arbitrary or unconstitutional action by the servants of the government.** I should not extend this category, - I say this with particular reference to the facts of this case, - to oppressive action by private corporations or individuals. Where one man is more powerful than another, it is inevitable that he will try to use his power to gain his ends; and if his power is much greater than the other's, he might perhaps be said to be using it oppressively. If he uses his power illegally, he must of course pay for his illegality in the ordinary way; but he is not to be punished simply because he is the more powerful. **In the case of the government it is different, for the servants of the government are also the servants of the people and the use of their power must always be subordinate to their duty of service.** It is true that there is something repugnant about a big man bullying a small man and very likely the bullying will be a source of humiliation that makes the case one for aggravated damages, but it is not in my opinion punishable by damages. (emphasis added)

[79] Article 5(1) in part II of the Federal Constitution states in crisp and clear language the constitutional protection of life and liberty:

> No person shall be deprived of his life or personal liberty save in accordance with law.

[80] A man's liberty is his prized possession. No state can take that away from him save in accordance with law. It goes without saying that if an offence has been committed or there is reasonable suspicion that an offence has been committed, then a person may be arrested by the police pending investigation. However in the case under the AFA there is no provision for bail to be allowed pending investigation, charge or trial before court-martial. It behoves those in authority then to be thorough in investigation so that no subject is unnecessarily deprived of his liberty. Here the defendants knew or ought to have known that the plaintiff was a temporarily seconded medical officer who had been commissioned for a short term of two years and then extended for another two years. He had asked for his secondment to be shortened to return to the MOH to continue serving this time civilians who are sick. The defendants knew for a fact that

he was working during the period of so-called desertion at the Selayang Hospital in the emergency ward, a place facing an acute shortage of experienced doctors. He was not on a frolic of his own as in deserting the Armed Forces in times of combat. The defendants knew that the paperwork for the cancellation of his commission had been put in process and in due course it shall be completed and the said officer being released as a member of the Armed Forces. There was nothing in the spirit of mutual assistance to be extended by one agency to another to prevent MINDEF from considering the plaintiff as a member undergoing decommissioning who is now being seconded temporarily back to his original service as a medical officer.

[81] Instead the defendants have chosen to visit upon the plaintiff the charge of AWOL or desertion. After putting him through the shameful process the defendants then declare that the whole court-martial proceeding is null and void *ab initio* and that the court-martial had no jurisdiction in the matter! The decision of dismissal was not confirmed by the Chief of Navy and it was as if everything had been as before the open arrest and the court-martial.

[82] However, one cannot just simply turn back the hands of the clock. A person's liberty has been compromised; his dignity rummaged and ruined. It is most lamentable when considering the fact that such an action of open arrest and subsequent court-martialing could have been avoided if only the two agencies could have sat down and resolve the matter amicably. While two agencies folded their arms and refuse to compromise, each confident in the fact that they are right, the plaintiff is left to languish in a no-man's land: an officer on temporary secondment who has been commissioned for a short-term who now has received a transfer order to go back to his original service, and having done so is now ordered to come back to his base on pain of being court-martialed for desertion until his decommissioning is completed!

[83] In the circumstance an award of exemplary damages is called for in the ardent hope that such a thing does not ever happen again. The court awarded RM50,000 as exemplary damages.

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Pronouncement

[84] To recapitulate, this court awarded the following against the defendants:

B

(i) The sum of RM10,626.78 being arrears of salaries to be paid by D3 to the plaintiff;

(ii) The sum of RM282,000 being general damages for 141 days of wrongful detention at RM2,000 per day;

C

(iii) The sum of RM100,000 for pain and suffering and loss of reputation;

(iv) The sum of RM50,000 being aggravated damages; and

(v) The sum of RM50,000 being exemplary damages.

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[85] Interest on items (ii) to (v) shall carry interest at 5% per annum from date of writ to realisation. I also awarded costs of RM20,000 to be paid by the defendants to the plaintiff.

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Postscript

[86] It is only too obvious that if the two government agencies had sat down together to communicate and consult with each other and to seek proper legal advice, they would have come to a common consensus; avoiding the calamity caused to the plaintiff

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and more than that the unnecessary anguish and anxiety, shame and suffering that would accompany the subject through the proceeding and the punishment from a court-martial. The pain became more poignant when all the plaintiff wanted to do was to serve people in need in his service to the nation. It is most

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lamentable that the plaintiff found himself languishing in a legal limbo while the two agencies locked in a dispute, luxuriate in leaving it to the passage of time to provide a solution. The solution did come in the natural effluxion of time as his two-year extension came to an end but that was far too late. If there is

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any party out to prove a point here then it has been done at the price of liberty of a subject that the state is constitutionally obliged to preserve, protect and promote. The courts remain that bulwart and bastion against any erosion of a subject's liberty.

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